Supreme Court U.S.
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No. 02-411

IN THE

Supreme Court of the United States

PLAYGIRL, INC.,

Petitioner,

v.

JOSE SOLANO, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 15.2, Respondent Jose Solano, Jr. objects to the questions presented by Petitioner Playgirl, Inc. ("Playgirl") because they are unduly argumentative in violation of Supreme Court Rule 14.1(a) and seek consideration of questions not accurately reflecting the proceedings or holding below. If this Court is inclined to grant certiorari in this action, Respondent respectfully submits that the following are more accurately-phrased questions:

1. Did the Ninth Circuit correctly apply widely-accepted standards in reversing summary judgment on the issue of the falsity of the message conveyed by the January 1999 cover of Playgirl Magazine?

2. Did the Ninth Circuit correctly apply the appropriate standard on the issue of actual malice by reversing summary judgment because a reasonable jury could find actual malice under a clear and convincing evidence standard?

3. Was the Ninth Circuit correct in holding that intentionally false speech is not protected under the First Amendment?

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STATEMENT OF THE CASE

I. Introduction and Summary of Argument

The pending petition for certiorari challenges a reversal of summary judgment arising from a false message knowingly conveyed by Petitioner Playgirl, Inc. ("Playgirl"). On the January 1999 cover of Playgirl Magazine – a publication renowned for its photographs of naked men and other sexually-explicit content – Playgirl falsely represented that Respondent Jose Solano, Jr., a television actor, had posed nude for the magazine, and that his nude body could be viewed within its pages. Playgirl conveyed that false message to the public by surrounding a photograph of Mr. Solano's upper body with the following headlines:

"PRIMETIME'S SEXY YOUNG STARS EXPOSED"

"12 SIZZLING CENTERFOLDS Ready to Score with You"

"BOTTOMS UP! Hot Celebrity Buns"

"BAYWATCH'S BEST BODY Jose Solano"

Members of Playgirl's editorial staff, including its third most senior editor, testified in deposition that the staff composed the January 1999 cover knowing that, based on these suggestive headlines overlapping Mr. Solano's photograph, "someone's going to think that he's naked in there." App. 14a. In reality, Mr. Solano had never authorized Playgirl to use his name or photograph, much less posed nude for the magazine. Following its senior vice president's edict to "sex up" the magazine's covers, Playgirl proceeded to publish these misleading headlines juxtaposed with Mr. Solano's photograph, even though members of its own

editorial team "didn't feel like it was fair to do that." App. 5a-6a, 12a. Based on this record, a three-justice panel of the United States Court of Appeals for the Ninth Circuit unanimously reversed the District Court's erroneous entry of summary judgment in Playgirl's favor, and remanded the case for trial.

Playgirl's petition fails to provide any basis for this Court to review the Ninth Circuit's decision. Despite the length and number of the questions presented in its petition, Playgirl does not, and cannot, identify: (1) a conflict with the holdings of other federal appellate courts or with state courts of last resort sufficient to warrant this Court's intervention; (2) a conflict with this Court's relevant decisions; or (3) an important unsettled question of federal law, as required to warrant this Court's review. *See* Sup. Ct. R. 10.[1] Nor can Playgirl demonstrate that certiorari is necessary to remedy an injustice or undo a grave harm. No liability has been imposed in this case; all that is at issue on the pending petition is the Ninth Circuit's conclusion that triable issues of fact exist, entitling Mr. Solano to a trial.

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1. In addition to its substantive defects, Playgirl's petition also is procedurally defective, and should be denied on that basis. Specifically, Playgirl's petition violates Supreme Court Rule 14.1(a), which provides in pertinent part: "The questions [presented for review] should be short and should not be argumentative or repetitive." Sup. Ct. R. 14.1(a). Here, Playgirl's proposed questions – which consume nearly two full pages – are both prolix and argumentative in the extreme. The questions also are impermissibly prefaced by a paragraph of narrative text mischaracterizing the facts of this case, in violation of Rule 14.1(a)'s provision that "no other information may appear" on the page of a petition containing the questions presented for review. *Id.*

First, Playgirl cannot demonstrate that grounds for certiorari are presented by the Ninth Circuit's holding that triable issues of fact exist regarding the falsity of the message Playgirl conveyed by juxtaposing Mr. Solano's photograph with headlines promising "exposed" television stars and "sizzling centerfolds" on the cover of a magazine best known for explicit pictures of naked men. In deciding that a jury question exists because Playgirl's January 1999 cover is reasonably susceptible to a false meaning, the Ninth Circuit applied a well-established standard similar to those employed in other circuits and state courts. This widely-applied standard simply reflects the basic reality that many misleading statements, though arguably susceptible to an innocent construction if parsed word-by-word in isolation, convey a decidedly false and disparaging message when viewed and read in context. This is particularly true of the statements at issue in this case, in light of Playgirl Magazine's sexually-explicit content, and the fact that it is displayed for sale in sealed plastic bags, preventing curious shoppers from ascertaining its true contents.

Second, Playgirl cannot show grounds for certiorari based on the Ninth Circuit's holding that triable issues of fact exist on the issue of actual malice, *i.e.*, Playgirl's knowledge that its January 1999 cover conveyed a false message regarding Mr. Solano, or its reckless disregard regarding the cover's truth or falsity. On this issue, the Ninth Circuit applied the standards this Court has established for the actual malice analysis, and found that, based on the record before it, a reasonable jury *could* find actual malice under a clear and convincing evidentiary standard. To require a showing beyond this effectively would rewrite the summary judgment standard, and would eliminate the role of the jury on all claims which require proof of actual malice.

Finally, Playgirl cannot demonstrate that this Court's review of the Ninth Circuit's decision is necessary to avert a chill on expression protected under the First Amendment, in connection with California's false light or misappropriation torts, or on any other theory. The Ninth Circuit's decision, and Mr. Solano's claims, are entirely consistent with this Court's pronouncements, and similar pronouncements by the federal appellate courts and state courts of last resort, that the First Amendment affords no protection to intentionally false speech.

II. Underlying Facts

Mr. Solano is thirty-one years old, and was raised in Northern California. Following his high school graduation in 1989, Mr. Solano joined the United States Navy, and served on an amphibious assault ship during the Persian Gulf war. After receiving an honorable discharge, Mr. Solano attended college and began an acting career, which included his portrayal of a lifeguard on the television show *Baywatch*. Mr. Solano has never accepted an acting role involving nudity, has never posed for nude photographs, and has never consented to the use of his name or photograph in Playgirl Magazine.

Since at least 1990, every issue of Playgirl Magazine has contained photos of naked men, including a nude "centerfold" consisting of a photograph of a naked man displayed over two pages. App. 4a. At most newsstands, Playgirl Magazine is displayed in sealed plastic bags, that reveal the magazine's cover but prevent a potential purchaser or casual browser from opening the magazine to determine if the man pictured on the cover actually appears nude inside. Pet. at p. 7 n.2; Pet. App. 1f-2f.

In late 1998, Playgirl's senior vice president Carmine Bellucci instructed the members of Playgirl's editorial staff that they "really needed to sex up the magazine . . . he wanted it to be basically like dripping sex." App. 5a-6a. Theresa O'Rourke, Playgirl's associate editor at the time, gave this account of Bellucci's directive: "[U]sing hotter words, hotter adjectives . . . just trying to give the impression that there was more in the magazine. There was more nudity in the magazine." App. 8a.[2]

Bellucci reiterated that directive during the editorial meeting in or about October 1998, at which Playgirl's staff composed the headlines to accompany Mr. Solano's photograph on the January 1999 cover. App. 8a. In keeping with Bellucci's instructions, Playgirl's editorial team composed the text that appeared on the top of the cover, "PRIMETIME'S SEXY YOUNG STARS EXPOSED." As Ms. O'Rourke testified in deposition, the intent behind this headline was to convey the false impression that Mr. Solano – the only television actor whose picture was slated to appear on the cover – appeared nude inside the magazine:

> Q. Would it be fair to say then that the objective of writing a line like "Primetime's Sexy Young Stars Exposed" was to convey the impression that

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2. Contrary to Playgirl's attempts to trivialize her role in the editorial process, the record establishes that Ms. O'Rourke – whose name appeared third from the top of the editorial masthead in the January 1999 issue of Playgirl Magazine – was directly involved in the composition of the cover headlines at issue in this lawsuit, and participated in the meetings at which those cover headlines were discussed. App. 4a-8a.

there were nude photos of primetime's stars in the magazine without expressly saying that?

A. Yes.

App. 9a.[3]

At the time this and the other cover headlines were composed, Playgirl knew that no nude photos of Mr. Solano or any other primetime television actors would appear in the January 1999 issue. App. 2a-3a. As Ms. O'Rourke testified in deposition, she and other members of Playgirl's editorial staff had serious misgivings about conveying a false message to the contrary: "[S]ome of us didn't feel like it was fair to do that." App. 12a.

Playgirl also was aware that the headline "12 SIZZLING CENTERFOLDS Ready To Score With You" was likely to mislead readers into believing that Mr. Solano was one of the nude centerfold models. Playgirl intentionally placed this language on the upper left corner of the cover, where text pertaining to the man on the cover ordinarily would appear. App. 13a-14a ("Q. You're pointing to the space where the '12 Sizzling Centerfolds' language is? A. Yes. Q. And that ordinarily is where language pertaining to the cover subject would appear on a cover [of Playgirl]? A. Yes.").

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3. Playgirl does not dispute that, at the time this headline was composed, the phrase "Primetime's Sexy Young Stars" was intended to refer to Mr. Solano. App. 2a-3a ("Q. At the time you approved the banner for the January 1999 Playgirl cover, did you understand Jose Solano to be a primetime sexy young star as those words are used in the banner? A. Yes.").

At their cover line meeting, Playgirl's editors discussed the false impression they knew was likely to arise from this deceptive headline placement: "I know something was voiced because we'd always say this is where the cover subject goes. So, you know, someone's going to think that he's naked in there." App. 14a-15a. Ms. O'Rourke testified that these and similar concerns were regularly "blown off" by senior vice president Carmine Bellucci: "It was just, so what." App. 14a-15a.[4]

The January 1999 issue of Playgirl Magazine was displayed on newsstands in mid-December 1998. The issue contained images of simulated oral sex, simulated sexual intercourse, photographs of naked men in various states of sexual arousal, close up photographs of men's penises and dozens of advertisements for phone sex services and sexually-explicit paraphernalia. The feature entitled "TV Guys" began on page 20 of the magazine. No nude photographs of Mr. Solano or any other television actors appeared in that feature or anywhere else in the magazine.

As a result of the false impression Playgirl's January 1999 cover conveyed, Mr. Solano suffered profound humiliation and embarrassment, and repeatedly was required to assure his friends and business associates that, contrary to the message of Playgirl's cover headlines, he had not posed nude for the magazine.

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4. The January 1999 cover also contained the headline "BOTTOMS UP! Hot Celebrity Buns," positioned near the bottom portion of Mr. Solano's body. Playgirl admits that Mr. Solano was the only "celebrity" pictured on the cover, and that the term "buns" refers to a man's buttocks. App. 3a. Finally, overlapping Mr. Solano's thigh, the cover contained the headline "BAYWATCH'S BEST BODY Jose Solano."

REASONS FOR DENYING THE PETITION

I. In Holding That Triable Issues Of Fact Exist Regarding The Falsity Of The Message Conveyed By The January 1999 Cover Of Playgirl Magazine, The Ninth Circuit Correctly Applied A Well-Established And Widely-Accepted Legal Standard

Playgirl bases the first portion of its petition on the assertion that, in deciding that triable issues of fact exist based on evidence that the January 1999 cover of Playgirl Magazine was reasonably susceptible to a false meaning, the Ninth Circuit applied an inappropriate standard. Playgirl is wrong.

The law has long recognized that words and phrases take on meaning from their accompanying context. As Justice Holmes observed in *Towne v. Eisner*, 245 U.S. 418, 425 (1918), "[a] word is not crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used."

In the context of claims for defamation or false light, the courts repeatedly have underscored the importance of the role of the trier of fact in examining words and phrases in their full context, to determine if the meaning they conveyed was actionable or innocent.[5] As the Third Circuit explained

5. While defamation and false light are separate causes of action, numerous courts have recognized that the two claims are substantively similar, contrary to Playgirl's attempts to compartmentalize the two torts. *See Howard v. Antilla*, 294 F.3d 244, 250-51 (1st Cir. 2002); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001); *Braun v. Flynt*, 726 F.2d 245, 250 (5th Cir. 1984) ("Federal courts

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in reversing summary judgment on a defamation claim, "[w]ords take on meaning in the company of other words. They are gregarious. They take on tone and color from syntax and context." *St. Surin v. Virgin Islands Daily News*, 21 F.3d 1309, 1317 (3d Cir. 1994). The effect of context may be enough to transform an otherwise benign phrase into a defamatory charge; "words innocent on their face may, when explained in context, convey a defamatory meaning." R. Smolla, *Law of Defamation*, (11th ed. 1997), § 4.05[1].[6]

To preserve the interpretive role of the trier of fact in evaluating statements in context, a number of federal appellate courts, applying state law in diversity actions, repeatedly have articulated the same standard applied by the Ninth Circuit in this case – holding that triable issues of fact exist where a statement reasonably could be understood in a defamatory sense, even if an innocent meaning also is possible. Thus, in *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983), the District of Columbia Circuit declined to apply an "innocent

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(Cont'd)

have frequently noted the similarities between the two causes of action and have often carried over elements of state defamation law into their consideration of false light invasion claims."), *cert. denied*, 469 U.S. 883 (1984). California law, applicable to this diversity case, is no different. *Selleck v. Globe Int'l*, 212 Cal. Rptr. 838, 845 (Ct. App. 1985) ("An action for invasion of privacy is in substance equivalent to a libel claim.").

6. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), this Court recognized the converse of this principle, holding that statements couched in the context of opinion may give rise to liability where "a reasonable factfinder could conclude that the statements . . . imply [a factual] assertion[.]"

construction" standard, and reversed a trial court's entry of dismissal:

> [A] court's power to hold as a matter of law that a statement is not defamatory is very limited. It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot reasonably be understood in any defamatory sense that it can rule as a matter of law that it is not libelous.

Id. at 1465 (citations omitted).

Similarly, in *Toney v. WCCO Television*, 85 F.3d 383 (8th Cir. 1996), the Eighth Circuit partially reversed a summary judgment based on statements "that are reasonably susceptible to a defamatory meaning as well as an innocent one." *Id.* at 386. In reasoning strikingly similar to the Ninth Circuit's in this case, the court held: "If the words are capable of a defamatory meaning, it is for the jury to decide if they in fact were so understood. Thus, at the summary judgment stage, the judge must not conclusively interpret [such a] statement; rather, the judge should only decide whether a statement is capable of being interpreted as defamatory." *Id.* (citations omitted).

McBride and *Toney* are just two examples of this well-established standard for the evaluation of statements that form the basis of defamation or false light claims. As the Second Circuit recognized in *Levin v. McPhee*, 119 F.3d 189 (2d Cir. 1997), the threshold inquiry under New York law is the same as the California standard applied by the Ninth Circuit in this case – namely, "whether the statement allegedly to have caused plaintiff an injury is *reasonably susceptible* to the

defamatory meaning imputed to it." *Id.* at 195 (emphasis added). *See also Wells v. Liddy*, 186 F.3d 505, 530-31 (4th Cir. 1999) (partially reversing summary judgment; under Virginia law, statements "capable of defamatory meaning" must be evaluated by trier of fact); *Brown v. Petrolite Corp.*, 965 F.2d 38, 43 (5th Cir. 1992) (affirming judgment for plaintiff on defamation claim; "Texas law looks to the effect of the statement on 'ordinary readers'"); *Afro-American Publishing Co. v. Eli Jaffe*, 366 F.2d 649, 655 (D.C. Cir. 1966) ("What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest.").[7]

The contrary rule Playgirl advocates in this case – which would eliminate the availability of general damages if a defendant's false message conceivably is susceptible to an innocent construction – runs afoul of this Court's settled pronouncements on both liability and damages in expression-related cases. First, Playgirl's proposed test ignores the *Milkovich* court's emphasis on the role of a "reasonable factfinder" in assessing the existence of a false factual message, by empowering courts to limit a plaintiff's recovery

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7. *Pope v. Chronicle Publishing Company*, 95 F.3d 607 (7th Cir. 1996), cited by Playgirl, does not conflict with these authorities or with the Ninth Circuit's decision in this case. Although the *Pope* court applied an "innocent construction" standard under Illinois law, that standard requires that statements be "considered *in context*, with the words *and the implications therefrom* given their natural and obvious meaning." *Id.* at 613 (emphasis added, citations omitted). In this case, given the context in which Playgirl's headlines appeared (namely, the cover of a magazine renowned for its photographs of naked men), the record compels the conclusion that the "natural and obvious meaning" of terms like "exposed" and "sizzling centerfolds" overlapping Mr. Solano's photograph is the unmistakable message that he appeared nude in the magazine.

to special damages based on a judge's singlehanded determination on summary judgment that an innocent construction of the statements at issue may exist. *See Milkovich*, 497 U.S. at 21. Playgirl's drastic elimination of the availability of general damages whenever an innocent construction is possible also would ignore this Court's recognition that "actual injury [from false statements] is not limited to out-of-pocket loss," and that general damages are available to redress "personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974).

Apart from the legal flaws in Playgirl's approach, the unique factual record of this case eliminates the risk of the hypothetical editorial dilemmas described in Playgirl's petition. As reflected in the Ninth Circuit's decision, its reversal of the District Court's summary judgment was based on a highly unusual confluence of factors – including the unique context of a magazine notorious for publishing photographs of naked men, the particular impact of Playgirl's headlines in light of the public display of the magazine in sealed plastic bags, and the admissions by Playgirl's witnesses that those headlines could be read to state that Mr. Solano appeared nude inside. App. 2a-3a; 15a-16a.[8]

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8. Contrary to Playgirl's suggestion in its petition that its witnesses ascribed only innocent meanings to the headlines at issue in this case, even Playgirl's senior vice president Carmine Bellucci conceded that the headline language is reasonably susceptible to the false meaning that Mr. Solano appeared nude in Playgirl Magazine: "Q. Can exposed refer to photographic exposure? A. Yes. Q. Can exposed refer to exposure in nude photographs? A. Perhaps."). App. 2a.

These are not circumstances that are likely to arise in any of the hypothetical scenarios Playgirl posits, and they do not warrant the exceptional measure of a writ of certiorari.[9]

II. The Ninth Circuit Correctly Applied Well-Established Standards On The Issue Of Actual Malice

In addition to challenging the Ninth Circuit's holding that triable issues of fact exist regarding the falsity of the headlines on the January 1999 cover of Playgirl Magazine, Playgirl also challenges the Ninth Circuit's holding that triable issues of fact exist on the issue of actual malice – Playgirl's knowledge that it was conveying a false impression, or its reckless disregard for the truth or falsity of its message. Here again, Playgirl cannot demonstrate that the Ninth Circuit deviated from settled law, or that its holding was so unjust as to warrant certiorari.

It has long been established that a plaintiff may prevail on the issue of actual malice through the use of "direct or indirect evidence." *Herbert v. Lando*, 441 U.S. 153, 160 (1979). As this Court has observed, actual malice, like other issues turning on a defendant's state of mind, "does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). A defendant's motivation – like Playgirl's intent to "sex up" its magazine covers – is highly relevant to the actual malice analysis. *Curtis Publishing v. Butts*, 388 U.S. 130, 169 (1967) (Warren, C.J., concurring) (stating that actual malice was question of

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9. Notably, *none* of the hypothetical scenarios Playgirl describes involve sexually-explicit content like that of Playgirl Magazine, or the unique impact of headlines when a magazine is displayed for sale in sealed plastic bags.

fact where defendant was "anxious to change its image" and adopted "a program of 'sophisticated muckraking' designed to 'provoke people, make them mad.'"). Recognizing defendants' natural inclinations to deny liability, this Court has held that "professions of good faith" cannot suffice to negate evidence to the contrary. *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).[10]

In light of the First Amendment interests served by the actual malice standard, this Court has held that actual malice must be established under a clear and convincing evidence standard, and that this burden of proof should be considered at the summary judgment stage. *See Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). This does not, however, require a plaintiff to prove his or her case on actual malice in its entirety at the summary judgment stage. On the contrary, where a defendant moves for summary judgment on the issue of actual malice, all inferences, including "questions of credibility and of the weight to be accorded particular evidence," must be drawn in favor of the non-moving party. *Masson v. New Yorker Magazine*, 501 U.S. 496, 520 (1991).

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10. Consistent with this Court's pronouncements, the federal appellate courts have underscored the importance of circumstantial evidence in the actual malice analysis. *See, e.g., Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485, 512 (1984) (explaining that relevant factors in actual malice determination include "negligence, motive and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice"); *Brown v. Petrolite Corp.*, 965 F.2d 38, 47 (5th Cir. 1992) (stating that a "court or jury may infer actual malice from objective circumstantial evidence, which can override a defendant's protestations of good faith"); *Hunt v. Liberty Lobby*, 720 F.2d 631, 643 (11th Cir. 1983) (explaining that absent an outright admission of actual malice, a party must look to circumstantial evidence).

While a plaintiff must meet the clear and convincing standard of proof of actual malice, "during summary judgment proceedings initiated by a defendant, a court must draw all possible inferences in the plaintiff's favor." *Wells v. Liddy*, 186 F.3d 505, 543 (4th Cir. 1999); *McFarlane v. Esquire* Magazine, 74 F.3d 1296, 1304 (D.C. Cir. 1996) (stating non-moving party is entitled to an "aggregate consideration" of all the party's claims, with the evidence construed most favorably to the non-moving party).

As this Court explained in *Anderson*, a plaintiff need not demonstrate that he is certain to win at trial to withstand summary judgment on the issue of actual malice. Rather, "the plaintiff, to survive the defendant's [summary] judgment motion, need only present evidence from which a jury *might* return a verdict in his favor." *Anderson*, 477 U.S. at 257 (emphasis added).

Nowhere in this case did the Ninth Circuit depart from these clearly-established standards. Indeed, far from ignoring the clear and convincing evidence standard, the Ninth Circuit expressly acknowledged this heightened burden of proof at the outset of its actual malice analysis: "[T]o survive summary judgment [Mr. Solano] must, as a public figure, also establish by *clear and convincing evidence* that Playgirl's editors knowingly or recklessly created this false impression." Pet. App. 10a (emphasis added).

Multiple pieces of evidence support the Ninth Circuit's finding that Mr. Solano met this burden:

- Senior vice president Carmine Bellucci's directive that Playgirl's staff "sex up" the magazine's covers;

- Associate editor Theresa O'Rourke's testimony regarding intentional use of the word "exposed" to convey a false impression of nudity;

- Ms. O'Rourke's admission that she "didn't feel like it was fair to do that";

- Ms. O'Rourke's testimony regarding Playgirl's intentional placement of the "sizzling centerfolds" headline where text regarding the cover model ordinarily appeared;

- Ms. O'Rourke's recognition that, as a result of the headlines juxtaposed with Mr. Solano's photograph, "someone's going to think that he's naked in there"; and

- Ms. O'Rourke's recollection, albeit general, that these concerns were brought to Carmine Bellucci's attention.

App. 4a-15a.

Against this backdrop, Playgirl cannot demonstrate that the Ninth Circuit either applied an erroneous legal standard, or erred in the application of the correct legal standard.[11]

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11. Tacitly conceding this point, Playgirl takes issue with the Ninth Circuit's weighing of evidence, claiming that it gave Ms. O'Rourke's testimony "far more meaning" than it should have. Pet. at 24. Not only is this quibbling insufficient to warrant certiorari, but it also ignores Ms. O'Rourke's central role in the editorial process, as well as the legal principle, long established in this Court's jurisprudence, that actual malice on the part of an employee may be

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No grounds for certiorari arise from the Ninth Circuit's rulings on actual malice.

III. The Ninth Circuit's Decision Does Not Chill Expression Protected Under The First Amendment

Finally, Playgirl posits that the Ninth Circuit's decision in this case signals an expansion of California's false light and misappropriation torts which would chill the exercise of First Amendment rights unless reversed by this Court. This argument ignores the impact of the findings supported by the record in this case – namely, a message reasonably susceptible to a false meaning, coupled with evidence of actual malice.

The freedom of expression protected under the First Amendment is not without limitation. *See Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700, 1707 (2002); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography unprotected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement unprotected); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity unprotected); *Beauharnais v. People of State of Illinois*, 343 U.S. 250, 266 (1952) (libel unprotected). While freedom of speech is to be preserved,

> there are categories of communication and certain special utterances to which the majestic protection

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(Cont'd)
attributed to a corporate defendant like Playgirl on a theory of respondeat superior. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 (1974) (reversing judgment for defendant; publisher was liable for writer's knowledge of falsity "under traditional doctrines of respondeat superior").

> of the First Amendment does not extend because they 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

Bose, 466 U.S. at 504 (citations omitted).

Consistent with this reasoning, this Court directly has held that "spreading false information in and of itself carries no First Amendment credentials." *Herbert*, 441 U.S. at 171 (1979).[12] In light of the evidence that Playgirl intentionally spread false information in this case, certiorari is not necessary to protect any First Amendment interest, particularly after the Ninth Circuit's application of the elements of falsity and actual malice standard as threshold requirements for Mr. Solano to proceed to trial on *any* of his claims. No further safeguards or presumptions are necessary; as this Court stated in *Calder v. Jones*, 465 U.S. 783, 790-91 (1984), "the potential chill on protected First Amendment activity . . . is already taken into account in the constitutional limitations on the substantive law governing such suits."

Put differently, publishers are already protected from the chill Playgirl fears may arise from California's false light and misappropriation torts. As reflected in the Ninth Circuit's decision in this case, a public figure plaintiff cannot overcome

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12. California case law on statutory misappropriation of likeness, applied by the Ninth Circuit in this case, echoes this Court's statement in *Herbert*. *See Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 352 (Ct. App. 1983) ("We therefore hold that Civil Code Section 3344(d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood.").

the newsworthiness privilege applicable to these claims unless he or she produces evidence of: (1) the existence of a false message; and (2) the defendant's knowledge of falsity or reckless disregard for the truth. The Ninth Circuit's holding that the unique facts of this case satisfy both of these criteria does not mark an expansion of California's tort regime, but simply applies widely-accepted principles that already safeguard First Amendment interests.

CONCLUSION

For the foregoing reasons, Playgirl's petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS OF DEPOSITION TESTIMONY

Ninth Circuit Appellant's Excerpts of Record ("ER")

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV 00-01242 DT(Ex)

JOSE SOLANO, JR.,

Plaintiff,

–against–

PLAYGIRL, INC. and DOES 1 through 25, inclusive,

Defendant.

Videotape deposition of the defendant PLAYGIRL, INC. by CARMINE BELLUCCI, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Appendix

Ninth Circuit Appellant's ER 519:6-11

* * *

Q. Can exposed also refer to photographic exposure?

A. Yes.

Q. Can exposed also refer to being exposed to a nude photograph?

A. Perhaps.

* * * *

Ninth Circuit Appellant's ER 520:12-521:6

* * *

Q. At the time you approved the banner for the January 1999 Playgirl cover, did you understand Jose Solano to be a primetime sexy young star as those words are used in the banner?

A. Yes.

Q. And you knew at the time that you approved the language in the banner that no nude photographs of Mr. Solano, in fact, appeared in Playgirl magazine that month, correct?

A. Yes.

Q. You also knew at the time you approved the text of the January 1999 Playgirl cover that, in fact, Mr. Solano was not a Playgirl centerfold that month, correct?

A. Yes.

Q. And you knew as well that Mr. Solano's buns did not appear in the January 1999 issue of Playgirl magazine, correct?

A. Yes.

* * * *

Videotape deposition of defendant PLAYGIRL, INC. by BRUCE CHEW, taken by plaintiff, pursuant to notice, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on October 31, 2000 at 2:00 p.m., before Catherine M. Donahue, a Certified Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 535:2-5

* * *

Q. Do you have an understanding of what the term "buns" means as it is used in that particular phrase?

A. I would assume it is their butt.

* * * *

Appendix

Ninth Circuit Appellant's ER 535:16-19

Q. As you sit here today, can you think of any issue published since 1990 in which the Playgirl centerfold was not nude?

A. No.

* * * *

Videotape deposition of THERESA O'ROURKE, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP, 405 Lexington Avenue, New York, New York 10174 on November 2, 2000 at 2:00 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 583:1-24

* * *

Q. What were your duties as associate Editor of Playgirl?

A. I basically wrote all of the front of the book material which is basically what it is, front of the book, a lot of like the small blurby items that are in the front of the magazine. And I would also write the copy that went along with the pictorials from all the pictorials, interview models. There are some celebrity interviews that I had to do. And then I was, in addition to the other editors, we all helped edit the entire magazine.

Q. Were you ever responsible for writing any of the text that appeared on the covers of Playgirl magazine?

A. Yes. We used to have cover line meetings with Carmine Bellucci, with him and with all the editors at Playgirl. And we'd sit there and just hash them out like an hour or so.

Q. Was it just members of the editor staff who would participate in the cover line meetings?

A. Yes.

* * * *

Ninth Circuit Appellant's ER 590:11-591:13

* * *

Q. Did Carmine Bellucci in connection with the preparation of the January 1999 issue of Playgirl say that it was important to him that the cover generate high sales of the magazine?

A. Yes. But that was every issue he would say that. So this issue was no different.

Q. Do you recall him saying that about this issue?

A. Yes.

Q. What do you remember him saying?

A. I don't really remember word for word, but I think it was just being reiterated that our covers that were a little bit more conservative were not doing well. And that we really needed to sex up the magazine. We needed hotter cover lines. We needed hotter pictures. It just — he wanted it to be basically like dripping sex. So that's just something — we would have these conversations on a daily basis. I remember a lot like towards this period and towards the last few months of me being there.

Q. When you say "this period," are you referring to the period of time when you were working on the January 1999 —

A. Yes.

Q. — issue?

A. Yes.

* * * *

Appendix

Ninth Circuit Appellant's ER 592:19-593:14

* * *

Q. Did you participate in any meetings at which the cover lines that appear on the January 1999 cover were composed?

A. Yes. We had the typical cover line meeting with Carmine and the others.

Q. When was the cover line meeting, if you recall?

A. The cover line meeting would usually occur towards the end of the production cycle. So just as we were getting ready to go to print. Probably a week before we'd be ready to go to print. It was like one of the last things we'd do.

Q. Do you remember approximately by month when the cover line meeting took place for the January 1999 issue?

A. It was probably October, I would say.

Q. Do you remember where the meeting took place?

A. It was always in Carmine's office.

* * * *

Appendix

Ninth Circuit Appellant's ER 594:22-595:18

* * *

Q. What do you remember of the discussion at the cover line meeting for the January 1999 issue?

A. It was just again like what I was saying, about sexing up the magazine.

Q. What do you mean by "sexing up?"

A. Just, you know, using like hotter words, hotter adjectives. Just using more — just trying to give the illustration that there was more in the magazine. There was more nudity in the magazine. They were just hotter articles in the magazine. So just was just pushing that concept.

Q. At the time the January 1999 cover line meeting took place, during that meeting do you remember if anyone said anything about wanting to convey the impression that there was more nudity in the magazine than there was?

A. Yes. That was also the basis of all the cover line meetings was that we wanted to make sure that they thought they were getting more.

* * * *

Appendix

Ninth Circuit Appellant's ER 597:15-598:18

* * *

Q. Do you think that the line "Primetime's Sexy Young Stars Exposed" alludes to the possibility that there might be nude photos of television stars in the magazine?

MR. RAYGOR: Objection. You already asked that. She already told you what was behind that statement.

MR. ANSCHELL: I didn't ask the question the same way. So you can go ahead and answer.

A. Yes. Because it's exposed, naturally you think of nudity. So I'm sure that someone could take that away from it. But it was, like I said, when we wrote that we didn't say primetime's sexy young stars nude because that would be wrong. It would be a lie. So saying the word exposed gives you sort of — like it alludes to the fact that maybe there is a little bit more. You have a guy on the cover who's in his trunks so, ooh, maybe he's going to be nude. And then having I think another reason why — well, I can finish and you can go on to your next question.

Q. Would it be fair to say then that the objective of writing a line like "Primetime's Sexy Young Stars Exposed" was to convey the impression that there were nude photos of primetime's stars in the magazine without expressly saying that?

A. Yes.

* * * *

Appendix

Ninth Circuit Appellant's ER 599:9-600:6

* * *

Q. As of the time of the cover line meeting, had the pictorials for the January 1999 issue already been selected?

A. "Pictorials," meaning the nude pictorials?

Q. Yes.

A. Yes.

Q. All the nude men had already been chosen?

A. Yes.

Q. Were those of you who were in the cover line meeting made aware of that in some way before the cover line meeting?

A. Aware of the fact that the photos were chosen?

Q. Yes.

A. Yes. Because we had already — this was towards the — like I said, the end of the issue cycle when we would do cover lines. So everything was already written at that point. We had, the editors had written the copy to go with those pictorials. So, yes, everyone knew.

* * *

Appendix

Ninth Circuit Appellant's ER 600:11-15

Q. At the time that cover line was written did you know that it would be appearing somewhere near Jose Solano's picture on the January 1999 cover?

A. Yes. It was done for a reason.

* * * *

Ninth Circuit Appellant's ER 601:5-602:7

* * *

Q. Let me just make sure that our record is clear.

Ordinarily, would the cover line pertaining to the man appearing on the cover appear in the upper half of the cover just to the left of the man's picture?

A. Yes.

MR. RAYGOR: To be clear about it she was pointing at the specific place where it says "12 Sizzling Centerfolds Ready To Score With You".

THE WITNESS: Yes, for the most part. There may have been maybe an issue or two where because of the photo that we had, say, someone's face would be there so it wouldn't be there. For the most part though, that area was open. So we'd have the cover subject's cover line right here like I just said.

Q. As you recall, was there any discussion in the cover line meeting for the January 1999 issue of Playgirl magazine of conveying the impression that there was a nude centerfold of Jose Solano in the magazine without expressly saying that?

A. Yes. But it was more for this "Primetime's Sexy Young Stars Exposed" cover line.

* * * *

Ninth Circuit Appellant's ER 602:11-20

Q. Do you remember anyone in the cover line meeting for the January 1999 issue saying anything in particular about the possibility that readers might expect to see primetime's TV stars nude inside the magazine based on the phrase "Primetime's Sexy Young Stars Exposed"?

A. Yes. That would be, you know, a subject of debate every time we had a cover line meeting. Because some of us didn't feel like it was fair to do that.

* * * *

Appendix

Ninth Circuit Appellant's ER 603:13-604:17

* * *

Q. Let's return to "12 Sizzling Centerfolds Ready To Score With You".

At the time that language was composed, was there any discussion of the possibility of readers expecting to see a centerfold of Jose Solana in the magazine?

A. Yes. I think either I brought it up or one of the editors brought it up. Because we always — the way we'd go about these cover line meetings is we'd have our master list. And then we had the location of where we felt like things should be. So as I said to you, this was always where the cover subject would be.

Q. Let me stop you.

You're pointing to the space where the "12 Sizzling Centerfolds" language is?

A. Yes.

Q. And that ordinarily is where language pertaining to the cover subject would appear on a cover —

A. Yes.

Q. — of Playgirl?

A. So originally, you know, we would go about it where, say, okay, now here's our cover subject. What are we going to say about him. But we had already decided that we were going to use our TV Guys thing as a banner which is on top of the Playgirl logo, the "Primetime's Sexy Young Stars Exposed" headline.

* * * *

Ninth Circuit Appellant's ER 605:11-606:6

* * *

Q. Do you in specific remember any discussion at the cover line meeting about the possibility that readers might think that Jose Solano was one of the "12 Sizzling Centerfolds"?

A. I think so. I remember I didn't say anything. I think Christine may have said something. But I don't know. I can't put words in her mouth. But I know something was voiced because we'd always say this is always where the cover subject goes. So, you know, someone's going to think that he's naked in there.

Q. And you think it may have been Christine Garcia that said that at this meeting?

A. It may have been, yes. But I'm not sure.

Q. Do you remember if anything was said in response to that sentiment being voiced?

A. That was always kind of blown off.

Q. Blown off by whom?

A. Carmine. It was just, so what.

* * * *

Videotape deposition of the defendant SERENA L. SPIEZIO, a witness, taken by plaintiff, pursuant to subpoena, held at the offices of Hale and Dorr, LLP 405 Lexington Avenue, New York, New York 10174 on November 1, 2000 at 4:45 p.m., before Robert M. Levine, CM, a Shorthand Reporter and Notary Public of the State of New York.

Ninth Circuit Appellant's ER 687:8-688:10

* * *

Q. Let me direct your attention to what's been described to me previously as the banner.

Is the phrase "Primetime's Sexy Young Stars Exposed", what's described as a banner —

A. Yes.

Q. — on this cover?

Okay, taking a look at that banner, do you think it would be reasonable for somebody seeing this cover as a whole, including the picture of Jose Solano, to expect to see nude photos of Jose Solano inside the magazine?

MR. RAYGOR: Same objection. It asks her to guess what might be in somebody's head when they read that.

A. Yes.

Q. Why?

A. Because it says TV Guys and they're being exposed. And it's Playgirl magazine. What else would they be exposing but their bodies?

Q. Is that because Playgirl magazine regularly exposes the bodies of the men that it features?

A. Well, that's what it's there for.

Q. So is the answer yes?

A. Yes.

* * * *